

RONALD BEASLEY)	
Claimant)	
VS.)	
)	Docket No. 206,321
TERRY FAELBER d.b.a.)	
AGD SECURITY COMPANY)	
Respondent)	
Uninsured)	
)	
AND)	
)	
WORKERS COMPENSATION FUND)	

ISSUES

Judge Barnes denied claimant's request for benefits after finding that claimant was an independent contractor rather than an employee. The issues now before the Appeals Board are:

- (1) For purposes of the Workers Compensation Act, was claimant an employee of the respondent or an independent contractor when he was injured?
- (2) Did claimant's injury arise out of and in the course of employment with respondent?
- (3) Was claimant's written claim timely?
- (4) What is the average weekly wage?
- (5) What is the nature and extent of claimant's injury and disability?
- (6) Is the respondent financially unable to pay the benefits due under this Award, if any, so as to shift responsibility for payment to the Workers Compensation Fund?
- (7) Is Dr. Michael P. Estivo's deposition part of the evidentiary record?

FINDINGS OF FACT

(1) In January 1994, Ronald Beasley began working for Terry Faelber performing miscellaneous duties that included, among other activities, mowing, tree trimming, maintaining vehicles, mending fences, cleaning kennels, handling guard dogs, installing wire for security systems, repairing dog houses, and occasionally working as a security guard. When he was injured in December 1994, Mr. Beasley spent approximately one-half of his time helping to install security systems.

(2) Mr. Faelber is the sole proprietor of AGD Security Company, a company that sells security systems and provides security guards and dogs.

(3) On a daily basis, Mr. Faelber directed the work Mr. Beasley would perform. Mr. Beasley would usually arrive at work at approximately 7:00 a.m. When he arrived, Mr. Faelber would have a list of tasks that he wanted Mr. Beasley to perform that day. Mr. Beasley had no freedom to select what work he performed on any particular day.

(4) Although Mr. Beasley provided his own hand tools, Mr. Faelber furnished the power tools, ladder, and all the materials and components that were required to install a security system or perform the other assigned tasks. Mr. Faelber also furnished a truck for transportation.

(5) Mr. Beasley did not have the authority to hire assistants to assist him in installing the security systems or the other tasks he performed for Mr. Faelber.

(6) Mr. Beasley testified Mr. Faelber was paying him \$5.50 per hour when he was injured. Mr. Faelber, however, contends he was paying Mr. Beasley pursuant to invoice billings. The Appeals Board finds that Mr. Beasley's testimony is the more credible and that he was earning \$5.50 per hour on the date of his injury and that he generally worked between 30 and 40 hours per week. Although the record does not disclose the wages paid Mr. Beasley for the 26 week period before his injury, according to the copy of the form 1099 admitted into evidence, Mr. Beasley earned a total of \$7,865 while working for Mr. Faelber during the 1994 calendar year.

(7) Mr. Beasley does not maintain an independent business that offers its services to others. Except for helping his roommate paint apartments in exchange for their rent and utilities, Mr. Beasley only worked for Mr. Faelber during the 1994 calendar year.

(8) In March 1994, after another individual had quit working for Mr. Faelber and filed for unemployment benefits, Mr. Faelber asked Mr. Beasley to sign a document that identified Mr. Beasley as a subcontractor doing business as Ronald Beasley Construction.

(9) The terms of the March 1994 document require Mr. Beasley to wire and install alarm systems, and furnish all labor and materials, for "\$5.00 per build unit . . . per weekly invoice." Despite the document's provisions, the working relationship between Mr. Beasley and Mr. Faelber did not change. And, Mr. Faelber continued to provide all the materials and components.

(10) During 1994, other individuals besides Mr. Beasley worked for Mr. Faelber. One individual cared for the dogs, three others worked as guards, and another individual occasionally helped with installing alarm systems when they encountered an unusually large job. Mr. Faelber contends that all the individuals that performed work for him are subcontractors and that he has never hired an employee during his 14 or 15 years in business.

(11) On December 30, 1994, one of Mr. Faelber's dogs attacked Mr. Beasley when he attempted to prevent it from leaving its pen. At the time of the incident and at Mr. Faelber's specific request, Mr. Beasley was inspecting the work of another individual who was relatively new to caring for the dogs. The incident occurred at Mr. Faelber's residence where he kennels his dogs and from where he conducts his business operations.

(12) As a result of the attack, Mr. Beasley required numerous stitches in his right arm and right leg. According to the opinions of Phillip R. Mills, M.D., who is board certified in physical medicine and rehabilitation, Mr. Beasley has a 10 percent permanent functional impairment to the right upper extremity as the result of the injuries he received on

December 30, 1994. The Appeals Board finds the opinions of Dr. Mills more persuasive than those of Dr. Estivo.

(13) The Appeals Board takes official notice that, despite immediate knowledge of the incident, Mr. Faelber did not file an accident report with the State Division of Workers Compensation to report the December 1994 injury.

(14) Mr. Beasley served written claim upon Mr. Faelber and commenced this claim for benefits within one year of the date of accident. The application for hearing was filed with the Division of Workers Compensation on November 7, 1995.

(15) Mr. Faelber does not have workers compensation insurance coverage for the date of Mr. Beasley's injury. Mr. Faelber's testimony that he is unable to pay the outstanding medical expense, which is now over \$23,000, is credible. The Appeals Board finds that Mr. Faelber does not have the financial resources at this time to pay the workers compensation benefits that Mr. Beasley may be entitled to receive.

CONCLUSIONS OF LAW

(1) The Workers Compensation Act is to be liberally construed to bring employers and employees within its provisions and protections.¹

(2) Workers compensation statutes are to be liberally construed to effect legislative intent and award compensation to a worker where it is reasonably possible to do so.²

(3) It is often difficult to determine in a given case whether a person is an employee or independent contractor since there are elements pertaining to both relations that may occur without being determinative of the relationship.³

(4) There is no absolute rule for determining whether an individual is an independent contractor or an employee.⁴

(5) The relationship of the parties depends upon all the facts and the label that they choose to employ is only one of those facts. The terminology used by the parties is not

¹K.S.A. 44-501(g).

²Kinder v. Murray & Sons Construction Co., Inc., Docket No. 76, 296 (Kan. 1998).

³Jones v. City of Dodge City, 194 Kan. 777, 402 P.2d 108 (1965).

⁴Wallis v. Secretary of Kans. Dept. of Human Resources, 236 Kan. 97, 689 P.2d 787 (1984).

binding when determining whether an individual is an employee or an independent contractor.⁵

(6) The primary test used by the courts in determining whether the employer-employee relationship exists is whether the employer has the right of control and supervision over the work of the alleged employee and the right to direct the manner in which the work is to be performed, as well as the result that is to be accomplished. It is not the actual interference or exercise of the control by the employer but the existence of the right or authority to interfere or control, that renders one a servant rather than an independent contractor.⁶

(7) In addition to the right to control and the right to discharge the worker, other commonly recognized tests of the independent contractor relationship are: (1) the existence of a contract to perform a certain piece of work at a fixed price; (2) the independent nature of the worker's business or distinct calling; (3) the employment of assistants and the right to supervise their activities; (4) the worker's obligation to furnish tools, supplies, and materials; (5) the worker's right to control the progress of the work; (6) the length of time that the worker is employed; (7) whether the worker is paid by time or by job; and, (8) whether the work is part of the regular business of the employer.⁷

(8) Based upon the following facts, the Appeals Board concludes that, for purposes of the Workers Compensation Act, Mr. Beasley was Mr. Faelber's employee:

- (1) Mr. Beasley did not operate an independent business but only worked for Mr. Faelber;
- (2) Mr. Beasley maintained an ongoing working relationship with Mr. Faelber;
- (3) Mr. Faelber directed and controlled the work that Mr. Beasley performed;
- (4) The work that Mr. Beasley performed was an integral part of Mr. Faelber's security business;
- (5) Mr. Faelber provided the security system components, power tools, materials, and larger equipment items that were needed to perform the tasks that he assigned to Mr. Beasley;

⁵Knoble v. National Carriers, Inc., 212 Kan. 331, 510 P.2d 1274 (1973).

⁶Wallis, at 102-103.

⁷McCubbin v. Walker, 256 Kan. 276, 886 P.2d 790 (1994).

- (6) Mr. Faelber, instead of Mr. Beasley, scheduled and controlled the progress of the work; and,
- (7) Mr. Faelber paid Mr Beasley for the number of hours he worked each week rather than on a project basis.
- (9) Additionally, the Appeals Board concludes that the March 1994 agreement that identified Mr. Beasley as a subcontractor was entered into in an attempt to avoid payment of unemployment taxes and benefits and is a sham.
- (10) Mr. Beasley's injuries arose out of and in the course of his employment with Mr. Faelber. At the time of the attack, Mr. Beasley was inspecting the kennels at Mr. Faelber's request. The Appeals Board finds Mr. Beasley's testimony credible that Mr. Faelber asked him to inspect the kennels on the day of the injury.
- (11) As indicated above, the Appeals Board takes official notice that Mr. Faelber did not file an accident report with the State Division of Workers Compensation as required by statute.⁸ Because the accident report was not filed, the period to serve written claim required by K.S.A. 44-520a was extended to one year from the date of accident.⁹
- (12) Mr. Beasley did not work a standard number of hours per week. Based upon the record presented, Mr. Beasley has established that he worked at least 30 hours per week at \$5.50 per hour, for an average weekly wage of \$165. That conclusion is supported by the form 1099, which indicates Mr. Beasley earned a total of \$7,865 in 1994 or an average of \$151.25 per week.
- (13) Because his is a "scheduled" injury, the computation of permanent partial disability benefits is governed by K.S.A. 44-510d, which provides:

If there is an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule: . . .

⁸K.S.A. 44-557(a).

⁹K.S.A. 44-557(c); Childress v. Childress Painting Co., 226 Kan. 251, 597 P.2d 637 (1979). See Also McClellan v. Harris Enterprises, Inc., Docket No. 213,940 (February 1997); and Armstrong v. North American Philips Lighting, Docket No. 192,037 (March 1997).

- (13) For the loss of an arm, excluding the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 210 weeks

(14) As indicated above, the maximum number of weeks for an arm injury is 210. Multiplying that number by the 10 percent functional impairment rating yields a maximum of 21 weeks of permanent partial disability benefits that Mr. Beasley is entitled to receive as a result of this injury.

(15) The Workers Compensation Fund is responsible for the payment of benefits when an employer has no workers compensation insurance and the company is financially unable to pay the benefits required by the Act.¹⁰ In this instance, Mr. Faelber owns a small business operation and neither generates the income nor possesses the assets to be able to pay the benefits due Mr. Beasley as a result of this injury. Therefore, the Workers Compensation Fund should be responsible for the payment of benefits due Mr. Beasley under this Award. The Fund may seek reimbursement from Mr. Faelber for any amounts paid.¹¹

(16) The Administrative Law Judge extended Mr. Beasley's terminal date to allow him to take Dr. Michael Estivo's deposition. Both Mr. Faelber and the Workers Compensation Fund object to that extension and contend that the doctor's deposition should be excluded from the record. The Appeals Board disagrees. A judge may extend a party's terminal date for good cause shown.¹² On numerous occasions, the Appeals Board has stated it will allow the judges great latitude in controlling their dockets. That includes the taking of evidence and extending terminal dates.

The administrative law judges should not be bound by rigid technical rules of procedure. Instead, the Act directs them to give all parties a reasonable opportunity to be heard and present their evidence.¹³

AWARD

¹⁰K.S.A. 44-532a.

¹¹K.S.A. 44-532a.

¹²K.S.A. 44-523(b).

¹³K.S.A. 44-523(a).

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Nelsonna Potts Barnes dated January 29, 1998, should be, and is hereby, reversed.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Ronald Beasley, and against the respondent, Terry Faelber d.b.a. AGD Security Company, and the Workers Compensation Fund, for an accidental injury which occurred December 30, 1994, and based upon an average weekly wage of \$165 for 21 weeks of permanent partial disability benefits at \$110.01 per week, or \$2,310.21, for a 10% functional impairment to the right arm, all of which is due and owing.

The claimant is entitled to payment of the medical expense incurred to date for treatment of the December 30, 1994, injury. Should claimant require medical treatment in the future, he may seek appropriate authorization from the Director.

The attorney fee contract between claimant and his attorney is approved to the extent it conforms to the applicable version of K.S.A. 44-536.

The respondent and the Workers Compensation Fund are ordered to pay the administrative expenses incurred in this proceeding as set forth in the Award.

IT IS SO ORDERED.

Dated this ____ day of August 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Robert E. Shaver, Wichita, KS
Timothy J. King, Wichita, KS
Christopher J. McCurdy, Wichita, KS
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director